U.S. Department of Justice

Immigration and Naturalization Service

H2

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Vermont Service Center Date: JUL 17 2001

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e)

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed

The applicant is a native and citizen of Tanzania who is subject to the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because the Director, Waiver Review Division (WRD), U.S. State Department Visa Office has designated Tanzania as clearly requiring the services of persons with the applicant's specialized knowledge or skill. The applicant was admitted to the United States as a nonimmigrant exchange visitor in April 1992. The applicant married a native of Nigeria and naturalized United States citizen in May 1997, and she is the beneficiary of an approved petition for alien relative. She is seeking the above waiver after alleging that her departure from the United States would impose exceptional hardship on her U.S. citizen spouse and child.

The director determined the record failed to establish her U.S. citizen spouse and child would suffer exceptional hardship and denied the application accordingly.

On appeal, counsel states that a two-year separation between the applicant and/or her husband from their two-year old child would be unmerciful and detrimental to the child. The applicant explains that her husband cannot accompany her and their child to Tanzania because he cannot afford to resign his job. The applicant states that she has no job to return to as her government has waived it. This assertion only contradicts the determination of the WRD that Tanzania needs persons with the applicant's qualifications.

Section 212(e) of the Act states that: No person admitted under § 101(a)(15)(J) or acquiring such status after admission-

> (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or

> his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of...the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien),...the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest....

In its original form in the Act of June 4, 1956, section 212(e) of the statute did not expressly allow a waiver of the two-year foreign residence requirement because of hardship although they were permitted by regulation. In 1961 codification specifically authorized such waivers and this authorization was unchanged by the 1970 and 1976 amendments. Before the 1961 amendments, waivers of the two-year period because of hardship were readily granted. After the 1961 amendments the Service for several years acted quite strictly in passing on claims of alleged exceptional hardship, in line with legislative intent. Most claims of hardship were rejected until 1965. After 1965, under accumulating humanitarian pressures and other reasons, there was a relaxation of the former rigidity in considering hardship claims.

The 1970 amendments significantly narrowed the applicability of the foreign residence requirement and some of the hardship situations previously encountered no longer arise. In 1976, Congress reimposed the foreign residence requirement on physicians coming for graduate medical training. The last case law decisions generated by the Service were in a deportation proceeding in 1985 and a legalization proceeding in 1989. There is one lone case dated 1970 or later which specifically addresses the concept of exceptional hardship; Matter of Gupta, 13 I&N Dec. 322 (Dep. Assoc. Comm. 1970), where both parents were subject to the two-year foreign residence requirements.

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and does not represent exceptional hardship as contemplated by section 212(e) of the Act. See Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the

stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

In a discussion of the term "exceptional hardship," consideration must be given to the report in H.R. Rep. No. 721, 87th Cong., 1st Sess. 121 (1961), entitled *Immigration Aspects of the International Educational Exchange Program*. Subcommittee number one of the Committee on the Judiciary reiterated and stressed the fundamental significance of a most diligent and stringent enforcement of the foreign residence requirement and stated it is believed that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship. The court noted additionally that the significance traditionally accorded the family in American life warrants that where the applicant alleges that denial of a waiver will result in separation from both a citizen-spouse and a citizen-child, a finding of "no exceptional hardship" should not be affirmed unless the reasons for this finding are made clear. The court's insistence upon clear articulation of reasons in cases involving a citizen-spouse and a citizen-child is consistent also with Congressional policy.

The record contains an evaluation by a psychologist who conducted a parent-child inventory test and parenting stress test. The psychologist states that some separations cannot be avoided (natural disasters, a death) but when it can be avoided then there is no justification for a child to endure the emotional pain associated with the separation or the risks imposed on the child's development associated with the separation. The psychologist states that, while there is no clear evidence linking a prolonged separation with a particular psychological or emotional problem, because each child's personality differs and the quality of the parent-child relation prior to separation varies, the effect of a prolonged separation, has the potential to impact negatively on various areas of the child's development.

The record contains specific documentation which reflects that the applicant's child and spouse would be exposed to certain emotional and psychological problems caused by separation. The hardship of separation discussed and anticipated here, if the applicant's spouse chose to remain in the United States while the child accompanies the applicant abroad, is the usual hardship which might be anticipated during a temporary separation between family members

caused by military, business, educational, or other obligations. While certainly inconvenient, such hardship does not rise to the level of "exceptional" as contemplated by Congress.

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957), and Matter of Y--, 7 I&N Dec. 697 (BIA 1958). In this case, the burden of proof has not been met, and the appeal will be dismissed.

ORDER: The appeal is dismissed.